Hastings Communications and Entertainment Law Journal

Volume 16 | Number 3 Article 5

1-1-1994

Connick v. Myers and the First Amendment Rights of Public Employees

Mike Harper

Connick v. Myers and the First Amendment Rights of Public Employees

by
MIKE HARPER*

Table of Contents

* J.D. 1994, University of California, Hastings College of the Law; B.A. 1991, University of California at Santa Barbara. The author wishes to thank Professor William B. Lockhart for his insight, aid and encouragement, and Lawrence McClure, Barbara Lange and Matthew Walsh for their efforts, without which this Note could not have been finalized.

Introduction

In *Connick v. Myers*[1] the Supreme Court developed a test to determine whether a public employer's sanctions of an employee for expression receives First Amendment scrutiny. This test hinges upon whether a court finds that the expression addresses a matter of "public concern" as a matter of law.[2] If a court finds the expression to be unrelated to a matter of public concern, a public employer's sanction for the expression will not be scrutinized under the First Amendment absent the "most unusual circumstances."[3] Therefore, under *Connick*, a court's determination of whether an expression relates to a matter of public concern is crucial.

The *Connick* test has drawn heavy criticism from scholars.[4] The problems stem from ambiguities in the decision itself: The Supreme Court neither resolved how courts should determine whether the expression is of public concern, nor clearly outlined the situations in which the test should be applied. Additionally, lower courts have not satisfactorily resolved these issues.

This Note examines the *Connick* holding, highlights its guiding principles, and argues how, as well as the circumstances under which, the *Connick* test should be applied. Part I sets forth the three key

1. 461 U.S. 138 (1983).

2. *Id.* at 148 n.7.

3. *Id.* at 147.

4. *See, e.g.*, Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987) (discussing several problems with the *Connick* standard and arguing that it should be abandoned); Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1983); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990) (both citing the lack of consistency among the different federal courts); Nadine Renee Dahm, *Protecting Public Employees and Defamation Defendants: A Two-Tiered Analysis as to What Constitutes "A Matter of Public Concern,"* 23 VAL. U. L. REV. 587 (1989) (noting that the ambiguity in the current test leads to a chilling effect and suggesting clarifications); Matthew W. Finklin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323 (1988) (arguing the *Connick* standard is inappropriate when applied to an academic setting). *See also* John F. Connolly, Connick v. Myers: *Restricted Freedom of Speech for Public Employees*, 30 FED. BAR NEWS & J. 390, 390-94 (1983); Jonathan Allan Morks, Comment, Connick v. Myers: *Narrowing the Scope of Protected Speech for Public Employees*, 5 U. BRIDGEPORT L. REV. 337, 351-57 (1984); Gary P. Landry, Comment, Connick v. Myers: *A Matter of Public Concern*, 29 LOY. L. REV. 1174 (1983); Andrew C. Alter, Note, *Public Employees' Free Speech Rights*: Connick v. Myers *Upsets the Delicate* Pickering *Balance*, 13 N.Y.U. REV. L. & SOC. CHANGE 173 (1984-85); Paul Ferris Solomon, Comment, *The Public Employee's Right of Free Speech: A Proposal for a Fresh Start*, 55 U. CIN. L. REV. 449, 462-69 (1986); Kevin Thornton, Comment, *Dismissal of State Employee for Distributing Questionnaire Upheld Where Speech Tangentially Affected Public Concern and Questionnaire Had Potential to Disrupt Office, Undermine Supervisory Authority, and Destroy Close Working Relationships*, 13 U. BALT. L. REV. 365 (1984).

Supreme Court cases. Part II discusses lower court interpretations of the *Connick* standard and proposes a refinement. Part III analyzes the applicability of the *Connick* test to other First Amendment freedoms.

I
The Supreme Court Cases

For many years public employees exercised their First Amendment freedoms under the threat of discipline by their supervisors. This restraint was epitomized by Justice Holmes's statement that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[5]

The United States Supreme Court subsequently rejected this position:

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly.[6]

A. The Modern Four-Part Test

Judicial scrutiny of a public employee's claim that she was punished for exercising her free speech rights involves a four-step analysis.

First, the employee must demonstrate that the expression addresses a matter of public concern.[7] Unless an employee's expression relates to a matter of public concern, a court will not scrutinize an employer's reasons for disciplining the employee absent "most unusual circumstances."[8]

Whether an employee's expression relates to a matter of public concern is a question of law determined from the "content, form, and context of a given statement, as revealed by the whole record."[9] Thus, protection is not limited to public statements: "[A]n employee who chooses to communicate privately . . . rather than spread his views before the public" does not forfeit the First Amendment protection

5. *Connick*, 461 U.S. at 143-44 (quoting McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892)).

6. Speiser v. Randall, 357 U.S. 513, 526 (1958).

7. *Connick*, 461 U.S. at 146.

8. *Id.* at 147.

9. Rankin v. McPherson, 483 U.S. 378, 384-85 (1987) (quoting *Connick*, 461 U.S. at 147-48).

that would otherwise be afforded.[10] Although not every expression by a public employee in a government office will constitute a matter of public concern, the scope of public concern embraces a wide variety of speech directed to political, social, economic or cultural issues.[11]

When a public employee's speech concerns matters only of personal interest as an employee and does not concern issues of public concern, such expression is not "totally beyond the protection of the First Amendment."[12] However, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[13]

Second, once a court concludes that the speech addresses a matter of public concern, it still must decide whether the expression was a "substantial or motivating factor" in the employment decision.[14] As with the element of public concern, the employee bears the burden of persuasion.[15]

Third, if the employee successfully shows that her speech related to a matter of public concern and that it caused some action adverse to her employment, the State bears the burden of justifying its action on "legitimate grounds." Legitimate grounds exist when the State acts to promote its efficiency as an employer, and not merely because it disagrees with the speaker's opinion.[16] If the State meets its burden, the court must weigh the detrimental impact of the expression on the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," against "the interests of the [employee], as a citizen, in commenting upon matters of public concern."[17]

Applying this balancing, a court must not consider the statements in a vacuum. "The manner, time and place of the employee's expres-

10. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979).

11. *See, e.g.*, Green v. City of Montgomery, 792 F. Supp. 1238, 1251 (M.D. Ala. 1992) (citations omitted).

12. *Connick*, 461 U.S. at 147.

13. *Rankin*, 483 U.S. at 385 n.7 (quoting *Connick*, 461 U.S. at 147).

14. Mount Healthy City Sch. Dist. v. Doyle, 249 U.S. 274, 287 (1977).

15. *Id.*

16. *Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 150-51.

17. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); *accord Connick*, 461 U.S. at 150-51. "Such a balancing standard reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143.

sion are relevant, as is the context in which the dispute arose."[18] The employer's interests involve the consideration of whether and to what extent the speech in question threatened to disrupt the regular operation of the workplace either to impair discipline by superiors or harmony among co-workers, or to interfere with the speaker's duties.[19]

Finally, even if an employee prevails at each of these three steps, an employer may still avoid liability by demonstrating that it would have reached the same employment decision notwithstanding the expression. The rationale behind this fourth step is to avoid "plac[ing] an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[20]

Courts have had difficulty applying this four-part test because *Connick* neither defined what constitutes a matter of public concern, nor identified situations in which this test is applicable. A review of *Connick* as well as two other Supreme Court cases is crucial to a complete understanding of this test.

1. Pickering v. Board of Education: The Supreme Court Announces a Balancing Test

Marvin Pickering, a school teacher, was dismissed for writing a letter criticizing his school board's allocation of funds among athletic and educational programs.[21] The Court recognized that employees do not forfeit their constitutional rights by entering into public employment, but that the government's interest as an employer may justify restrictions upon the exercise of those rights in some instances.[22]

The Court adopted a case-by-case approach,[23] which will be referred to in this Note as "*Pickering*-balancing." The Court stated:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[24]

18. *Rankin*, 483 U.S. at 388. *See also* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415 n.4 (1979).

19. *Rankin*, 483 U.S. at 388.

20. Mount Healthy City Sch. Dist. v. Doyle, 249 U.S. 274, 285 (1977).

21. *Pickering*, 391 U.S. at 566.

22. *Id.*

23. "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it feasible to attempt to lay down a general standard against which all such statements may be judged." *Id.* at 569.

24. *Id.* at 568.

In *Pickering*-balancing, pertinent considerations include whether the statement impairs discipline by superiors or harmony among co-workers, detrimentally impacts close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties, or interferes with the regular operation of the enterprise.[25]

Ultimately the Court resolved the dispute in favor of Mr. Pickering, stating:

> [I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.[26]

2. *Connick v. Myers*: Limiting Scrutiny to Expression Relating to Matters of Public Concern

Sheila Myers was an assistant to Harry Connick, the New Orleans District Attorney.[27] Myers opposed her transfer to a different section of the criminal court.[28] Myers prepared and distributed to the other assistants a questionnaire concerning office transfer policy, morale, dispute resolution, the level of confidence in various supervisors and whether employees felt pressured to work in political campaigns.[29] Connick then told Myers that she was being terminated for refusal to accept the transfer and that he considered distribution of the questionnaire an act of insubordination. Myers filed suit contending that she was wrongfully discharged for exercising her First Amendment rights.[30]

The Court's holding in *Connick* resolved a clash between the First Amendment rights of public employees and the need to avoid interfering with public employers by scrutinizing every employment decision. On one hand, the Court was concerned with protecting the First Amendment rights of those working for public employers. It noted: "[O]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government. . . ."[31] This is important because without this protection the vast numbers of citizens who work for the government could be silenced by their employ-

25. Rankin v. McPherson, 483 U.S. 378 (1987) (citing *Pickering*, 391 U.S. at 570-73).
26. Pickering v. Board of Educ. 391 U.S. 563, 574 (1961).
27. Connick v. Myers, 461 U.S. 138, 140 (1983).
28. *Id.*
29. *Id.* at 141.
30. *Id.*
31. *Id.* at 147.

ers on important issues.[32] On the other hand, the Court recognized that a public employer could not function effectively if it must defend a federal lawsuit over every employment decision allegedly made in reaction to an employee's expression.[33]

In an effort to create a standard addressing these two concerns, Justice White's majority opinion drew a distinction between speech by an employee that addresses a matter of "public concern" and speech that addresses a matter of "private interest."[34] The Court held that if speech does not relate to a matter of public concern, a court shall defer to the employer's decision to discipline the employee absent "most unusual circumstances."[35]

The Court stated that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[36] The Court added that speech unrelated to matters of public concern is still afforded some protection, but it did not specify how much.[37]

Using this analysis, the Court held that the only question on Myers's questionnaire regarding pressure to work in political campaigns addressed a matter of public concern.[38] The remaining questions were deemed merely personal grievances or extensions of her personal dissatisfaction with the status quo.[39] The Court ruled that the overall survey had touched on issues of public concern in a very limited sense, and was more properly characterized as a personal grievance.[40]

Ultimately, the Court held that the potential of Myers's action to disrupt the operation of the District Attorney's office outweighed the limited First Amendment protection afforded her speech.[41]

32. *See, e.g.*, Massaro, *supra* note 4, at 6-8.

33. Connick v. Myers, 461 U.S. 138, 143.

34. *Id.* at 147.

35. *Id.*

36. *Id.* at 146.

37. *Id.* at 147.

38. *Id.* at 149.

39. *Id.* at 148.

40. *Id.*

41. "We do not suggest . . . that [speech] even if not touching upon a matter of public concern . . . is totally beyond the protection of the First Amendment . . . [but if it does not touch on such matters] government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146-47.

3. Rankin v. McPherson: The Court's Second Application of the *Connick* Test

McPherson was a data-entry employee in a county constable's office. She was fired because after she heard of the assassination attempt on President Reagan, she told her boyfriend that "if they go for him again, I hope they get him."[42]

In holding that McPherson's statement "plainly dealt with a matter of public concern"[43] the Supreme Court stressed the fact that "the statement was made in the course of a conversation about the policies of the President's administration."[44] The Court noted that although deference is necessary to employers in some instances under the *Connick* test "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[45]

As in *Connick*, the majority did not state how courts should determine what speech relates to a matter of public concern. However, in his dissent Justice Scalia characterized the method used by the majority:

> [T]here is no basis for the Court's suggestion . . . that McPherson's criticisms of the President's policies that immediately preceded the remark can illuminate it in such a fashion as to render it constitutionally protected. Those criticisms merely reveal the speaker's motive . . .[46]

Thus, it appears that the method the majority used to determine whether the speech involved a matter of public concern heavily emphasized the motivation behind the speaker's expression.

II
Application and Refinement of the *Connick* Test

A. The Unpredictable Outcome of the *Connick* Test

Courts have encountered many problems in applying the *Connick* test. The first problem is determining what constitutes a "matter of public concern."[47] As noted, *Connick* requires a judge to decide this issue as a matter of law,[48] yet the opinion provides little guidance.[49]

42. Rankin v. McPherson, 483 U.S. 378, 381 (1987).
43. *Id.* at 386.
44. *Id.*
45. *Id.* at 384.
46. *Id.* at 396 (Scalia, J., dissenting).
47. *See generally supra* note 4.
48. Connick v. Myers, 461 U.S. 138, 148 n.7 (1983); Brinkmeyer v. Thrall Indep. Sch. Dist., 786 F.2d 1291, 1295 n.4 (5th Cir. 1986). But for a criticism of this approach, see J.

The dissent in *Connick* feared that under this test First Amendment protection would be based upon whether a judge feels the subject is sufficiently important to merit protection.[50] In fact, some federal court judges have made the outcome of the *Connick* test depend on their individual value judgments.[51]

A second problem, closely related to the first, is that judicial subjectivity will have a chilling effect on expression. If a judge utilizes personal value judgments in defining a matter of public concern, an employee cannot be certain that her speech will be protected. Such uncertainty may make a person hesitant to express herself. As one commentator has observed:

> Employees may fear that if they speak out, they will lose their jobs, forfeit salary increase, or be denied promotions. In such circumstances, the most prudent thing is to do nothing. Unless the opportunity to speak without penalty is clear and readily enforceable self-imposed censorship [will be] imposed on many nervous people who live on narrow economic margins.[52]

The *Connick* Court noted that First Amendment freedoms must be protected against this sort of chilling effect:

> [In all of the cases preceding *Connick*] [t]he issue was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive'. . . The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[53]

Wilson Parker, *The Constitutional Status of Public Employee Speech: A Question for the Jury*, 65 B.U. L. REV. 483 (1985).

49. *Connick*, 461 U.S. at 154 ("[W]e do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."). The Court did state what evidence would be considered in making the threshold determination of whether an employee's speech regards a matter of public concern: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

50. "[B]ased on its own narrow conception of which matters are of public concern, [a] [c]ourt implicitly determines that information concerning employee morale at an important government office will not inform public debate. To the contrary, the First Amendment protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness." *Connick*, 461 U.S. at 164-65 (Brennan, J., dissenting). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18, at 930-31 n.15 (2d ed. 1988) ("[The *Connick*] approach invited the Court to engage in standardless balancing and subjective, content-based determination of the social importance of speech. . . .").

51. For example, at the trial level in Rankin v. McPherson the court ruled against McPherson stating "*I don't think it is a matter of public concern* to approve even more to [sic] the second attempt at assassination." Rankin v. McPherson, 483 U.S. 378, 385 n.8 (1987) (quoting the record) (emphasis added).

52. Massaro, *supra* note 4, at 7-8 (citations omitted).

53. Connick v. Myers, 461 U.S. 138, 144-45 (1983).

However, there is a potential problem with curbing the discretion of courts in deciding the outcome of the *Connick* test. The problem arises when the expression would normally be deemed unrelated to a matter of public concern, yet the facts compel the court and the speaker to call for protection of the expression.[54] If courts were to afford protection to speech unrelated to a matter of public concern, the circumstances must be clearly defined and consistent with *Connick's* goals.

B. The Content, Form and Context Standard

Many courts have adopted interpretations of the *Connick* test which focus on the Court's statement that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[55] In these elements: (1) content refers to the subject matter of the expression; (2) form refers to how it was conveyed; and (3) context refers to where and why the expression was made.[56] Variations on this approach have been emerging since the latter half of the 1980s.[57] This trend will be referred to as the "content, form and context" (CFC) standard.

The CFC approach is flawed because the outcome of a court's analysis depends upon a judge's subjective determination of what subjects or circumstances cause speech to be protected. Further, the Supreme Court offered no guidance on the relative importance of each factor. If the prongs of the CFC do not suggest the same conclusion, a judge determines which of the three factors is most important. Either way, an employee will have difficulty predicting whether her expression will be protected.

Even if a court employs an objective inquiry as to whether the subject matter or the form of the statement makes it one of public

54. *See, e.g.*, Massaro, *supra* note 4, at 29; *cf.* Edward L. Dunlay, *The Public Employee Can Disagree with the Boss—Sometimes*: Cox v. Dardanelle School District, 66 NEB. L. REV. 601 (1987) (formulating a test to determine what subject matters should be deemed inherently of public concern).

55. *Connick*, 461 U.S. at 147-48.

56. *See generally* Dahm, *supra* note 4, at 623-26 (distinguishing these elements).

57. *See, e.g.*, McKinley v. City of Eloy, 705 F.2d 1110, 1114-15 (9th Cir. 1983); Yoggerst v. Stewart, 739 F.2d 293, 296 (7th Cir. 1984); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985); Rode v. Dellarciprete, 845 F.2d 1195, 1201-02 (3d Cir. 1988); Kurtz v. Vickrey, 855 F.2d 723, 727 (11th Cir. 1988); McEvoy v. Shoemaker, 882 F.2d 463, 466 (10th Cir. 1989); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990); Ayoub v. Texas A & M University, 927 F.2d 834, 837 (5th Cir. 1991); Deremo v. Watkins, 939 F.2d 908, 911-12 (11th Cir. 1991); Copsey v. Swearingen, 790 F. Supp. 118, 120-22 (M.D. La. 1992); Grace v. Board of Trustees, 805 F. Supp. 390, 391-93 (M.D. La. 1992).

concern, the CFC standard does not effectively guarantee First Amendment protection in critical areas. For instance, First Amendment freedom should not depend upon whether the subject matter is already a matter of public concern. A test which protects those who discuss an issue after it has already become the subject of public attention, but fails to protect those who first recognize a problem and stir public controversy on that matter, is inconsistent with the First Amendment goal of fostering the search for truth.[58]

The form and context prongs of the CFC inquiry are similarly flawed. To afford First Amendment protection based upon where and how a statement was given is largely inconsistent with the Court's reasoning in *Givhan v. Western Line Consolidated School District*.[59] Courts employing the CFC standard are more likely to rule that expression relates to matters of public concern if an employee resorts to newspapers, television or other avenues instead of asserting grievances within the office.[60] If this became a prevalent strategy among disgruntled employees, the government employer's effectiveness in providing services would be undermined. As noted earlier, the primary reason *Connick* limits scrutiny in the first place is to enhance the ability of public employers to deal with their employees with minimal interference.[61]

Although the CFC standard is flawed in many respects, one aspect is not rejected here—that part of the context inquiry which asks *why* the employee spoke out on an issue. A large number of courts have embraced the CFC standard and held that although motive is relevant, it cannot be determinative of whether speech regards a "matter of public concern."[62] Some courts have emphasized the CFC

58. *See* Rowland v. Mad River Local Sch. Dist., *cert. denied*, 470 U.S. 1009, 1012 (Brennan, J., dissenting from the denial of certiorari).

59. "[The public] employee who arranges to communicate privately . . . rather than to spread his views before the public" should not be required to forfeit First Amendment protection. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979); *see also* Frederick Schauer, *"Private" Speech and the "Private" Forum*: Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 230-35.

60. *See* Massaro, *supra* note 4, at 22-23 n.100.

61. *See supra* text accompanying notes 29-32.

62. *See, e.g.*, Berg v. Hunter, 854 F.2d 238, 242-43 (7th Cir. 1988) (allegations of public misrepresentation of wage increases by employer held public concern despite entirely personal motives); Rode v. Dellarciprete, 845 F.2d 1195, 1201 (3d Cir. 1988).

prong concerning the employee's reason for expressing herself,[63] while others have stressed the importance of the other prongs.[64]

C. A Proposal: A Straight Motive Test

This new interpretation of the *Connick* test has three primary goals: (1) to make the outcome depend upon a more predictable basis, instead of a subjective, value-based determination by the judge;[65] (2) to end the chilling effect this subjectivity and uncertainty has on expression; and (3) to provide a method to determine the "unusual circumstances" under which a court should scrutinize sanctions of expression that do not relate to matters of "public concern."

This Note proposes that the speaker's motive should be the sole factor in determining whether the expression regards a matter of public concern. Courts also should abandon the practice of deeming certain matters "inherently" of public concern as it is subjective and unnecessary. Finally, courts should scrutinize sanctions of expression unrelated to a matter of public concern if such actions were spurred by prejudice.

The intent of the speaker must be the focus of the test. If the speaker intends her speech to further a social or political goal unrelated to employment, it should fall under the protected category of "public concern." This approach finds some support in Supreme Court cases.[66]

63. *See, e.g.*, McKinley v. City of Eloy, 705 F.2d 1110, 1114-15 (9th Cir. 1983); Yoggerst v. Stewart, 739 F.2d 293, 296 (1984) (7th Cir. 1984); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985); Kurtz v. Vickrey, 855 F.2d 723, 727 (11th Cir. 1988); Deremo v. Watkins, 939 F.2d 908, 911-12 (11th Cir. 1991); Ayoub v. Texas A & M Univ., 927 F.2d 834, 837 (5th Cir. 1991); Rode v. Dellarciprete, 845 F.2d 1195, 1201-02 (3d Cir. 1988); McEvoy v. Shoemaker, 882 F.2d 463, 466 (10th Cir. 1989); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990); Copsey v. Swearingen, 790 F. Supp. 118, 120-22 (M.D. La. 1992); Grace v. Board of Trustees, 805 F. Supp. 390, 391-93 (M.D. La. 1992).

64. *See, e.g.*, Arvinger v. Mayor of Baltimore, 862 F.2d 75, 79 (4th Cir. 1988) (holding that subject matter is the central element).

65. *See, e.g.*, Allred, *supra* note 4, at 75-76; Estlund, *supra* note 4, *passim* (both noting this problem and attempting to come up with a solution).

66. "Myers did not *seek* to inform the public . . . Nor did Myers *seek to bring to light* actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, *the focus of Myers' questions* is not to evaluate the performance of the office, but rather to gather ammunition for another round of controversy with her supervisors." Connick v. Myers, 461 U.S. 138, 148 (1983) (emphasis added). *See also* Rankin v. McPherson, 483 U.S. 378 (1987). In *Rankin*, both the majority and the dissent focused on what McPherson was trying to express: The majority looked to the motive for her speech and the dissent looked to its content. *Id.* at 396-97 (Scalia, J., dissenting). Both are relevant: The motive

This intent-based approach is appropriate to determine whether speech deserves protection. If the Court wishes to reward and encourage speech aimed at furthering societal interests, the most effective way is to protect speech that the speaker considered in the interests of society. By focusing on the speaker's intent, the test no longer rests upon a court's subjective determination of the expression's value.[67] Such an approach will ease the chilling effect and limit the inherent subjectivity of each court's decision. Limiting the inquiry to the intent or motive of the speaker provides a clear standard that is understandable to the employee.

This approach would also relieve an employer from First Amendment scrutiny in cases involving "merely personal grievances."[68] Therefore, if the speaker's motivation was to turn her employment grievance into a "cause celebre,"[69] rather than to benefit or inform the public-at-large of an issue the speaker felt had greater social importance, the speech falls under the category of "private" concern.[70]

---

should determine whether the speech is "public" or "private" and the content should determine whether the speech falls into an "unprotected" category.

67. *See* McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983) ("[O]ne of the fundamental purposes of the First Amendment is to permit the public to decide for itself which issues and viewpoints merit its concern.").

Further, a court should not look to public reaction to determine if expression is protected. If a judge is permitted to base a decision on what she perceives the public response to be, then it would allow a "heckler's veto." This should be avoided because the "[g]overnment's instinctive and understandable impulse to buy its peace—to avoid all risks of public disorder by chilling speech assertedly or demonstrably offensive to some elements of the public. . . [has been] one of the most persistent and insidious threats to First Amendment rights." Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985). Rather, the public reaction should be weighed on the side of the employer against the employee's First Amendment rights.

68.

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Connick, 461 U.S. at 147 (emphasis added).

69. *Id.* at 148 ("[Myers] questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.").

70. "Pickering, its antecedents and its progeny — particularly Connick — make it plain that the 'public concern' . . . inquiry is better designed . . . to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is." Flanagan v. Munger, 890 F.2d 1557, 1564 (10th Cir. 1989) (quoting Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985)).

The speaker's motive can be assessed from the subject of the expression, to whom it was addressed and how it was addressed.[71] It must be noted, however, that motive alone determines the amount of protection given the expression. Accordingly, the prongs of the CFC test serve merely as guidelines in determining the speaker's motivations.[72]

The straight motive test has received some judicial consideration, but it also has been rejected by some courts.[73] In disavowing a straight motive test, courts often point to *Connick's* assertion that some matters are "inherently a matter of public concern"[74] and therefore are protected regardless of the speaker's motive. Although this position is supported in *Connick*, it should be abandoned.[75] The classification of subject matter as "inherently of public concern" opens the door to judicial value judgments and arbitrary decisions. Courts have deemed a subject to be "inherently a matter of public concern" in one context, but not in another.[76] In most of these cases simply examining the speaker's motives would have led to the same result.[77]

This proposal's final goal is to enable courts to deal with the rare circumstances in which an employee grievance merits constitutional protection. This must be done in a manner consistent with the *Connick* decision, but without granting courts too much discretion.

This goal can be accomplished by breathing life into *Connick*'s escape clause, the "most unusual circumstances" exception. *Connick*

71. *See* Schalk v. Gallemore, 906 F.2d 491, 495-96 (10th Cir. 1990) (discussing how to find objective evidence of the speaker's subjective motive).

72. *See id.*

73. *E.g.*, Zamboni v. Stamler, 847 F.2d 73, 78 (3d Cir.), *cert.denied*, 488 U.S. 899 (1988).

74. Federal courts have recognized that although Connick's motives were personal in raising the question of pressure to work on political campaigns, the topic was deemed inherently a matter of public concern. *Id.* Although this is true, it should be abandoned for the reasons stated in the text.

Rankin may be seen as a retreat from this position, relying much more heavily on the motivations of the speaker than the subject of the speech. *Cf. Rankin*, 483 U.S. 378, 396-97 (Scalia, J., dissenting) (arguing the majority overemphasized motive to the exclusion of the content of the speech).

75. The majority in *Rankin* chose to investigate the context for her motivation in speaking rather than adopt the view of the Court of Appeals that the "life and death of the President are obviously a matter of public concern." *Rankin*, 378 U.S. at 385-86.

76. *See, e.g.*, Hesse v. Board of Educ., 848 F.2d 748, 752 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) (stating that a subject that might be "inherently a matter of public concern" in one context was not so in the present context because the expression was motivated solely out of concern over the internal operations of the agency).

77. *See id.* Further, focusing on motive is important because otherwise "every employment dispute involving a public agency could be considered a matter of public concern [depending on how the complaint is framed]." Barkoo v. Melby, 901 F.2d 613, 618 (7th Cir. 1990).

implies that in some "unusual circumstances" a court *should* scrutinize an employer's decision to discipline an employee for her speech.[78] However, no court has employed this language to justify scrutinizing sanctions of speech on a matter of private concern.[79] The Supreme Court has made it clear that a showing of most unusual circumstances cannot be made if the employer was unreasonable or mistaken in its decision.[80]

If an employee can show that her employer's motive was unconstitutional under other provisions of the Constitution, a court should scrutinize this claim as well as the First Amendment claim. One situation in which this exception should apply is outlined below.

A court should scrutinize employer sanctions for expression if the reason the expression triggered sanctions was that the employer was biased against a protected class of which the employee was a member. A court should take this approach in all circumstances, regardless of whether the expression relates to matters of public concern as sanctions implicate the equal protection clause as well as the First Amendment.

A good example of such a case is *Rowland v. Mad River Local School District*.[81] *Rowland* involved a school teacher who was fired after admitting she was bisexual. The jury found that Ms. Rowland's statements did not interfere with the regular operation of the school except to stir the anti-homosexual bias of her supervisor.[82] The court held that her termination was not actionable under the First Amendment because her speech did not involve a matter of public concern.[83]

Justice Brennan argued in his dissent from the Supreme Court's denial of certiorari that:

> [Ms. Rowland's] 'speech' perhaps is better evaluated as no more than a natural consequence of her sexual orientation. . . . Under this view, petitioner's First Amendment and equal protection claims may be seen to converge, because it is realistically impossible to separate her spoken statements from her status. The suggestion below that it was error not to separate the claims . . . and reliance on that suggestion to avoid discussion of the merits of petitioner's claim . . . again simply exposes the Court of Appeals' reluctance to

78. *Id.* at 147; *accord* Rankin v. McPherson, 483 U.S. 378, 385 n.7.

79. *But cf.* Rowland v. Mad River Local Sch. Dist., *reh'g. denied*, 470 U.S. 1009 (1985) (Brennan, J., dissenting) (arguing that some expression, such as 'coming out,' should not be analyzed under the *Connick* framework).

80. "[O]rdinary dismissals . . . are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." Connick v. Myers, 461 U.S. 138, 146-47 (1983).

81. 730 F.2d 444 (6th Cir. 1984).

82. *Id.* at 450.

83. *Id.* at 451.

> confront forthrightly the difficult issues posed by [Rowland's] case.[84]

The action was motivated by prejudice against bisexuals which was prompted by Ms. Rowland's admissions and, therefore, should be analyzed under the First Amendment and the equal protection clause.

If an employee's speech inflamed her employer's biases against a protected class to which she belonged and this resulted in an adverse employment decision, a court should review this as an unusual circumstance. The action taken by the governmental employer is unconstitutional under the equal protection clause,[85] and dissenting against such action should be protected regardless of the speaker's motivations.[86]

This exception also should apply to employees who are not members of the class but have been disciplined for taking a stand against this sort of discrimination. This is necessary to protect the ability of other employees to defend an employee subject to discrimination by the government.

This approach supports the balance struck in *Connick* between the rights of citizens who work for the government and the need of public employers to deal with their employees without excessive oversight. In *Connick*, the Court recognized the government's dual role as both an employer and a regulator. The Court also recognized that government employees have dual roles as both citizens and employees. The *Connick* decision appears founded on a presumption that if

84. Rowland v. Mad River Local Sch. Dist., *cert. denied*, 470 U.S. 1009, 1017 n.11 (Brennan, J., dissenting).

85. *See* Meinhold v. United States Dept. of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993); Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991); *see also* Selland v. Aspin, 832 F. Supp. 12, 15 (D.D.C. 1993) (finding plaintiff had a substantial likelihood of success in challenging military's ban of homosexuals). *But see* Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

86. *See, e.g.*, Terminello v. Chicago, 337 U.S. 1, 4 (1949) (citations omitted):

> [Speech] may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is not room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

See also Palmore v. Sidotti, 466 U.S. 429, 433 (1984):

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held. *Id.* (citation omitted).

expression is akin to an employee grievance (that is, related only to matters of personal interest), the government's interest as an employer will outweigh the employee's interest in expression. When a government employer sanctions an employee for speaking on matters of public concern, a court must weigh the competing interests of the employee and employer to determine whether the sanctions were justified. Otherwise, the government could control the expressive activity of its employees beyond what is necessary to be an effective employer.

In situations like *Rowland* this presumption is inappropriate.[87] Ms. Rowland's employer did not fire her for performance-related reasons; the government did not act to promote its efficiency as an employer. The decision was not merely "mistaken" or "unreasonable," but it was unconstitutional: The government fired her based upon her membership in a class which several federal courts have since held to be protected.[88] Likewise, an employee who is fired for supporting Ms. Rowland should be protected because the government's interest in terminating her should not be presumed to be related to its interest in promoting efficiency. Therefore, these circumstances should constitute a most unusual circumstance in which a court should scrutinize the discipline of speech unrelated to a matter of public concern.

III
Extensions of *Connick*

Although there are decisions to the contrary,[89] the better view is that the *Connick* threshold test should only apply to expression occurring at or relating to work.[90] *Connick* stands for the proposition that

87. *Rowland*, 470 U.S. at 1013 (Brennan, J., dissenting):

> The recognized goal of the *Pickering-Connick* rationale is to seek a "balance" between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption. *Connick*, and indeed, all our precedents in this area, addressed discipline taken against employees for statements that arguably had some disruptive effect in the workplace. This case, however, involves no critical statements, but rather an entirely harmless mention of a fact about petitioner that apparently triggered certain prejudices held by her supervisors.

Id. (citations omitted).

88. *See Meinhold*, 808 F. Supp. 1455; *Jantz*, 759 F. Supp. 1543; *see also Selland*, 832 F. Supp. at 15 (finding plaintiff had a substantial likelihood of success in challenging military's ban of homosexuals). *But see Steffan*, 780 F. Supp. 1; *Ben-Shalom*, 881 F.2d 454.

89. Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985) (*Connick* applied in case of a policeman who was disciplined for performing in blackface while off-duty, although never having made reference to his status as a policeman).

90. "[T]he *Pickering/Connick* framework was developed in the context of public-employee speech that either occurred at or was directed toward the workplace .... It appears

an employee should not have to forfeit her constitutional rights in order to work for the government; however, she also should not be able to turn any employment grievance into a constitutional claim.

Flanagan v. Munger involved a police chief's order to police officers who owned a video store to remove sexually explicit stock.[91] The officers challenged this order under the First Amendment. The Tenth Circuit held the *Connick* public concern threshold test inapplicable in cases in which the employee engages in nonverbal protected expression neither at work nor concerning work:

> The [public/private] test helps define public concern in an area in which the critical distinction should be whether the speech at issue takes on significance outside the workplace or whether it deals primarily with an employee's personal employment problem. However, . . . [if] the 'speech' already [took] place outside of the workplace the purpose behind using the public concern test is simply irrelevant.[92]

The reason that the *Connick* test is inappropriate in situations not either occurring at or concerning the workplace is found in the policies underlying the *Connick* decision. *Connick* denies scrutiny of employee grievances so that public employers need not defend their decisions in federal court.[93] If an expressive activity is not one which might be motivated by a desire to air an employment grievance, the *Connick* test should not apply.

The *Flanagan* court held that the government's interest as an employer must be weighed against the employee's First Amendment interests without the *Connick* threshold inquiry.[94] Instead, the court applied a *Pickering*-type balancing, modified to reflect any differences in the interests involved.[95] This is a proper approach.

The *Connick* test has been considered in several other First Amendment areas, and the federal judiciary is often widely split with regard to its applicability. These areas include the rights of public employees to associate, to testify truthfully at a trial and to petition the government for redress of grievances (file a lawsuit or grievance).

---

that the better-reasoned approach is to avoid trying to force into the Pickering/Connick framework cases involving allegedly protected expression that neither occurs at nor is about the workplace." Rothschild v. Board of Educ., 778 F. Supp. 642, 653 (W.D.N.Y. 1991).

91. 890 F.2d 1557 (10th Cir. 1989).

92. *Id.* at 1564. *See also* Rothschild, 778 F. Supp. 649-54 (holding *Connick* inapplicable after discussing the drawbacks to the approach taken in Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985)).

93. *See supra* text accompanying notes 29-32.

94. *Flanagan*, 890 F.2d at 1565.

95. *Id.* at 1562.

Courts have applied *Connick* to sanctions imposed on an employee for testifying.[96] For example, *Melton v. City of Oklahoma City*[97] involved a police officer who was fired for disclosing exculpatory material that the prosecution had withheld from the defense and for his testimony on behalf of the defendant at trial. The court properly held that *Connick* applies because the testimony related to work. In applying *Connick* the court held that his expression regarded a matter of public concern:[98] His motivations for testifying were more than a desire to turn an employment grievance into a "cause celebre."[99]

Federal courts are split as to whether *Connick* applies to associational freedoms. One line of cases holds *Connick* applicable because all First Amendment freedoms are cut of the same cloth;[100] another line holds it applicable because *Connick* based itself in part upon freedom of association cases.[101] Other courts hold *Connick* inapplicable to political affiliations citing Supreme Court cases on political association.[102]

96. *See, e.g.*, Neubauer v. City of McAllen, 766 F.2d 1567, 1572-73 n.5 (5th Cir. 1985) (police officer's testimony in grand jury proceedings held to be a matter of public concern); Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096, 1100 (5th Cir. 1987) (testimony by an employee under subpoena in another employee's civil suit held to be a matter of public concern); Altman v. Hurst, 734 F.2d 1240, 1243-44 (7th Cir. 1984) (holding expression unrelated to a matter of public concern in case of police officer who filed a lawsuit after having been disciplined for allegedly encouraging another officer to appeal her suspension). *Altman* contains a well-reasoned consideration of whether *Connick* should apply in these situations:

> [In *Connick*, g]iven the essentially "private motive" for the speech, plaintiff's firing was not actionable . . . Similarly, Altman's conduct, to the extent it can be construed as speech, did not involve matters of public interest; rather, it concerned a private personnel dispute . . . This formulation dovetails with the *Connick* rule that limits the first amendment protection given public employees to pronouncements on public issues. Thus, a private office dispute cannot be constitutionalized merely by filing a legal action.

Id. at 1244 & n.10.

97. 879 F.2d 706, 714-16 (10th Cir. 1989).

98. *Id.* at 713-14 (using a CFC analysis to reach this result).

99. It is important to distinguish between the motivations of the employee that brings her own grievance and one compelled to testify on another's behalf. If one employee is attempting to air a grievance while her co-worker is not, the co-worker is still under a duty to testify truthfully. *See Reeves*, 828 F.2d at 1100.

100. *See, e.g.*, Broaderick v. Roache, 767 F. Supp. 20, 25 n.9 (D. Mass. 1991) ("[A]ssociational interests should be analyzed under the same standard set forth in *Connick* . . . [because] I see no basis in the substantive law which affords freedom of association a higher level of protection than the right of free speech.").

101. *See, e.g.*, Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985).

102. *See* Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991); *accord* Boddie v. City of Columbus, 989 F.2d 745, 747 (5th Cir. 1993); *see also* Hatcher v. Board of Pub. Educ., 809 F.2d 1546, 1558 (11th Cir. 1987) (holding *Connick* inapplicable to associational freedoms without giving a satisfactory rationale).

Finally, some courts either have extended or have rejected the extension of *Connick* to association claims without discussion.[103] *Connick* should not apply here because the *act* of association itself cannot be characterized as an employee grievance. In addition, scrutinizing an adverse employment decision allegedly made on the basis of the employee's membership in a protected association would not constitutionalize what is otherwise merely an employee grievance.[104] Instead, courts should utilize a modified version of the *Pickering* test.[105]

Courts that have considered extending *Connick* to the right of petition (the right to participate in litigation as a party) have generally held the test applicable.[106] These cases get the right result—*Connick* should apply in these situations. These courts, however, have only considered the type of First Amendment right involved.[107] It is not

103. *See* Petrozza v. Incorporated Village of Freeport, 602 F. Supp. 137, 143 (E.D.N.Y. 1984) (holding that *Connick* applies to associational conduct without saying why); Gavriles v. O'Connor, 579 F. Supp. 301, 304 (D. Mass. 1984) (holding *Connick* inapplicable to freedom of association claims without explanation).

104. If an association is unprotected, obviously *Connick* would not apply. Courts scrutinize employer sanctions only to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government." Connick v. Myers, 461 U.S. 138, 147 (1983). Therefore, if an employer sanctions an unprotected activity there is no need for constitutional scrutiny. However, one court indicated it might consider whether *Connick* is applicable to association on a case-by-case basis:

> We do not hold that the "public concern" analysis is a necessary step in all public employee/freedom of association claims. In some constitutionally protected associations, "public concern" may be an inapt tool of analysis. For example, a public school teacher fired for being married would have a colorable freedom of association claim against her employer, but would likely not satisfy the public concern test. We see no reason to treat speech and association differently in cases like the one at bar, however, where, in context, the two interests are clearly identical.

Schalk v. Gallemore, 906 F.2d 491, 498 n.6. (10th Cir. 1990) (citation omitted).

105. *See* Rode v. Dellarciprete, 845 F.2d 1195, 1204-05 (3d Cir. 1988) (utilizing a test similar to the one advocated in this article in freedom of association cases).

106. *See, e.g.*, Schalk v. Gallemore, 906 F.2d 491, 498 (10th Cir. 1990) (*Connick* analysis applied to both free speech and right to petition claims in retaliatory discharge case); Hoffman v. Mayor of Liberty, 905 F.2d 229, 232-33 (8th Cir. 1990) (whether characterized as speech or petition, employee grievance was subject to the same analysis under First Amendment); Gray v. Lacke, 885 F.2d 399, 412 (7th Cir. 1989) (in right to petition retaliation claim of public employee, first inquiry is "whether petition touched upon matter of public concern"); Hickman v. Board of Trustees, 725 F. Supp. 1536, 1547 (D. Kan. 1989) (petition for redress must address a matter of public concern to be protected); Belk v. Town of Minocqua, 858 F.2d 1258, 1262-63 (7th Cir. 1988) (*Connick* applicable to right-of-petition cases); Stalter v. City of Montgomery, 796 F. Supp. 489 (M.D. Ala. 1992) (filing of fire fighter's grievance over order to shave chest hair subject to the *Connick* public/private concern test, and therefore unprotected from sanctions). *But cf.* McCoy v. Goldin, 598 F. Supp. 310, 314-15 (S.D.N.Y. 1984) (holding *Connick*'s public concern requirement inapplicable to the right of access to courts).

107. *See, e.g.*, Stalter v. City of Montgomery, 796 F. Supp. 489, 494 (M.D. Ala. 1992) ("To accept Plaintiff's argument [that *Connick* does not apply to the right of petition]

enough to say that *Connick* should apply because the right asserted is found in the First Amendment. A court must also consider whether scrutinizing these claims would be akin to giving constitutional protection to employee grievances. Allowing a public employee to gain scrutiny of an adverse employment decision in these circumstances would "require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state."[108]

Another line of case law holds that an employee does not have to contend with *Connick* if she uses grievance procedures that were collectively bargained for, even if she would not otherwise be able to gain constitutional scrutiny. These courts reason that the fruits of collective bargaining implicate the right to associate.[109] These cases misconstrue *Connick*. Although it might implicate the right to associate, a grievance filed through a union is no less an employee grievance than one aired at work. This approach clearly violates *Connick*'s edict against affording constitutional protection to mere employee grievances.

IV
Conclusion

Connick v. Myers represents a balance between the expressive rights of public employees and the need of government agencies to provide services efficiently. A citizen employed by the government should not be required to forfeit her constitutional rights; a public employer is an arm of the government and cannot deny its employees their fundamental rights. However, an employer must be able to discipline employees whose expressive activities inhibit the effectiveness of the employer's services.

The *Connick* Court held that if the expression is unrelated to matters of public concern, such as employment grievances, absent

would be necessarily to conclude that Plaintiff's rights under the petition clause of the First Amendment are separate and distinct from his rights under the free speech clause of that amendment.")

108. Connick v. Myers, 461 U.S. 138, 147 (1983).

109. *See* Stellmaker v. DePetrillo, 710 F. Supp. 891 (D. Conn. 1989) (right of public employee to file grievance under procedures established through collective bargaining implicates both petition and association rights and, therefore, *Connick* public concern analysis inapplicable); Gavriles v. O'Connor, 579 F. Supp. 301, 304 (D. Mass. 1984). *But see* Broderick v. Roache, 767 F. Supp. 20, 25 n.9 (D.C. Mass. 1991) (holding *Connick* applicable to negotiated union grievances; rejecting *Stellmaker*). *Cf.* Day v. South Park Indep. Sch. Dist., 768 F.2d 696, 701-03 (5th Cir. 1985) (the fact that employee chose to put her speech in formal grievance did not remove her petition claim from public concern analysis, absent implication of association rights).

most unusual circumstances a federal court will not scrutinize the reasons for sanctions. Thus, *Connick* provides the scope of protected expression.

The boundary between protected and unprotected expression must be clearly drawn and protect employees from being forced to forfeit their constitutional rights. Courts should examine the subjective motivation of the speaker to determine whether the expression was merely an employee grievance. Further, courts should scrutinize allegations that a decision to sanction was spawned from prejudice, stirred by the expression of membership in a protected class.

In deciding whether *Connick* should be expanded to new situations courts should look to what *Connick* represents and whether those concerns are present in a particular case. Courts should ask two questions in considering whether to apply *Connick* in a new First Amendment situation: (1) Is the behavior protected?; and (2) Would scrutiny of these claims constitutionalize what is otherwise merely an employee grievance?